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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. [redacted]510

RAY C. STEVENSON,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Ray C. Stevenson (hereinafter called "petitioner") respectfully shows:

I. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The Circuit Court of Appeals for the Ninth Circuit affirmed the order of the District Court of the United States for the Northern District of California dismissing the petition of petitioner for a writ of habeas corpus and discharging the order to show cause issued therein. (R. 25.)

The petition for writ of habeas corpus in the instant case presents no issue of fact.

The undisputed facts, as disclosed by the petition and the attached exhibits, are chiefly as follows:

On September 9, 1937, the petitioner was indicted by the grand jurors of the United States of America for the Southern Division of the Western District of Michigan. The indictment, a certified copy of which is attached to the petition, was in two counts and charges violations of Section 588b(a) and (b) of Title 12, U.S.C.A. (R. 9 to 11.)

The language of the said counts may be briefly restated as follows:

Count 1 charges that at a specified time and place the defendant "did then and there unlawfully and feloniously, from the presence of Donald G. Swarthout and E. W. Johnson, *by force and violence and by putting in fear* the said Donald G. Swarthout *by threat of force and violence and by the use and display of dangerous and deadly weapons,* to-wit, one sawed-off shotgun and two pistols, take certain cash and currency and coins, money of the United States * * * belonging to and in the custody and possession

of the Hall Street and Division Avenue Branch of the National Bank of Grand Rapids, Michigan * * *". (Note: Italics throughout the petition are those of the writer.)

Count 2 charges that at the same specified time and place the defendant "did then and there, unlawfully and feloniously, and while committing the offense set forth, charged and described in Count 1 of this indictment *assault* Donald G. Swarthout, branch manager, and E. W. Johnson, paying teller, of said Hall Street and Division Avenue Branch of the National Bank of Grand Rapids, Michigan, and put in jeopardy the lives of said Donald G. Swarthout and E. W. Johnson *by the use of dangerous weapons,* to-wit, one sawed-off shotgun and two pistols".

After conviction on these charges, petitioner on November 8, 1937, was sentenced and committed to the custody of the Attorney General of the United States for confinement in the United States Penitentiary at Leavenworth, Kansas, for a period of fifteen years under Count 1 of the indictment and for a period of twenty-five years under Count 2 of the indictment and it was further provided that the said sentences should run consecutively and not concurrently and that the term of imprisonment under the second count should commence to run at the expiration of the period of confinement under the first count. (R. 12.) Subsequently, and after petitioner had commenced to serve sentence on first count and on January 18, 1938, the trial judge modified the sentence made and entered on November 8, 1937, by providing that the same be

amended to read as follows: "Sentence under Counts 1 and 2 of the indictment to be served concurrently and not consecutively. It is further ordered that the sentences, as originally imposed, are to remain in full force and effect except as hereby amended." (R. 13 and 14.)

After being committed to the United States penitentiary at Leavenworth, Kansas, on July 8, 1938, petitioner was transferred to the United States Penitentiary at Alcatraz, California. (R. 7.) The term of imprisonment of petitioner for a period of fifteen years imposed by the trial Court on the first count expired and was fully served and satisfied on February 9, 1947. (R. 5.) Petitioner now seeks his release from the custody of the warden of that institution by writ of habeas corpus. In his petition, filed before the Court below, the above-stated facts are set forth in detail.

It is the petitioner's contention (1) that the judgment and sentence imposed on Count 2 of the indictment is void, and (2) that Section 588(a) and (b) does not create two separate crimes but prescribes alternative sentences for the same crime, and that having served and fully satisfied one of the alternative sentences petitioner is entitled to his immediate discharge and that his further confinement constitutes double punishment for the same offense.

The respondent filed a motion to dismiss the petition (R. 16), which was granted by the Court below when it made and entered its order dismissing the petition. (R. 25.)

II. JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U.S.C.A. Sec. 347(a), which in its pertinent language provides:

> "in any case, civil or criminal, in a Circuit Court of Appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari * * * that the cause be certified to the Supreme Court * * *"

The date of the judgment of the Circuit Court of Appeals herein sought to be reviewed was October 9, 1947. (R. 36.)

III. THE QUESTIONS PRESENTED.

Question 1. Whether the judgment and sentence imposed by the trial Court on the second count of the indictment was void.

Question 2. Whether the sentences imposed by the trial Court were alternative sentences for the same crime.

Question 3. If the answer to the second question is in the affirmative and petitioner has fully satisfied and served one of the alternative sentences, whether he is entitled to his immediate discharge on habeas corpus.

IV. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. Certiorari should be granted because the petition therefor presents important problems in the application of the penalties prescribed by Section 588b(a) and (b) of Title 12 U.S.C.A. which have not been but should be settled by the Supreme Court.

2. The Circuit Court in the instant case has decided important questions on the application of the penalties prescribed by Section 588b(a) and (b) of Title 12 U.S.C.A. in a way probably in conflict with its own decisions in the following cases:

Wilson v. United States (1944), 145 F. (2d) 734;

Coy v. Johnston (1943), 136 F. (2d) 818.

3. The Circuit Court has decided important questions on the application of the penalties prescribed by Section 588b(a) and (b) of Title 12 U.S.C.A. in a way probably in conflict with the Courts of Appeal in other circuits in the following cases:

Holbrook v. United States (CCA 8, 1943), 136 F. (2d) 649;

Miller v. United States (CCA 2, 1945), 147 F. (2d) 372;

Holbrook v. Hunter (CCA 10, 1945), 149 F. (2d) 230;

United States v. Sims (D.C. W.C. Mo., 1946), 72 F. Supp. 631.

See also:

Gant v. United States (CCA 5), 161 F. (2d) 793 at 797 (dissenting opinion).

4. Divergent opinions have been rendered in several circuits on the question of which count is valid and which count is invalid after the Court has imposed sentence under both subdivisions (a) and (b) of Section 588b of Title 12 U.S.C.A.

Wilson v. United States, supra;
Coy v. United States, supra;
Holbrook v. United States, supra;
Miller v. United States, supra;
Holbrook v. Hunter, supra:
Dimenza v. Johnston (CCA 9, 1942), 130 F. (2d) 465;
Hewitt v. United States (CCA 8, 1940), 110 F. (2d) 1;
United States v. Sims, supra.

See also:
Gant v. United States, supra.

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 11655, Ray C. Stevenson, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellee, to

the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as may be proper.

Dated, San Francisco, California,
December 26, 1947.

J. ZIRPOLI,
Attorney for Petitioner.

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Respondent.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the petitioner's attorney in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
December 26, 1947.

A. J. ZIRPOLI,
Attorney for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals, rendered October 9, 1947, is as follows:

Before Mathews, Healy and Orr, Circuit Judges.
Per Curiam.

The judgment of the District Court, 72 F. Supp. 627, is affirmed.

(Endorsed.) Opinion. Filed Oct. 9, 1947. Paul P. O'Brien, Clerk.

II.

JURISDICTION.

Petitioner adopts the reasons stated in the petition for writ of certiorari (p. 5) hereof) as supporting the jurisdiction of this Court.

III.

STATEMENT OF THE CASE.

Petitioner adopts the "Summary Statement of the Matters Involved", appearing in the petition for writ of certiorari (pp. 2-4 hereof) as a statement of the case, for the purpose of this brief.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court.

2. The Circuit Court of Appeals erred in not holding the judgment and sentence of the trial Court on the second count of the indictment to be void.

3. The Circuit Court of Appeals erred in not holding that petitioner having fully served the sentence imposed by the trial Court on the first count of the indictment was entitled to his immediate discharge.

4. The Circuit Court of Appeals erred in not holding that the sentences imposed by the trial Court on counts one and two of the indictment were alternative sentences.

5. The Circuit Court of Appeals erred in not holding that petitioner having fully served one of the alternative sentences imposed by the trial Court on counts one and two of the indictment was entitled to his immediate discharge.

V.

ARGUMENT.

Because of the conflicting judgments and decisions rendered and opinions written in the District Courts and the Circuit Courts of Appeal in the interpretation of Section 588b(a) and (b) of Title 12 U.S.C.A. and the application of the penalties prescribed thereby a writ of certiorari should issue in this case. This will be made apparent from the argument which follows below.

Specification of Error No. 1 is dependent on whether or not petitioner's position can be sustained on Specifications of Error Nos. 2 and 3 or 3 and 4.

SPECIFICATIONS OF ERROR 2 AND 3.

The judgment and sentence of the trial Court on the second count of the indictment is void.

Section 588b(a) and (b) of Title 12 U.S.C.A. (see Appendix) defines only one offense, committed in two ways.

Holiday v. Johnston, 313 U. S. 342, 349, 61 S. Ct. 1015, 1017;

Wilson v. United States (CCA 9, 1944), 145 F. (2d) 734;

Coy v. Johnston (CCA 9, 1943), 136 F. (2d) 818, 820;

Dimenza v. Johnston (CCA 9, 1942), 130 F. (2d) 465, 466;

Hewitt v. United States (CCA 8, 1940), 110 F. (2d) 1, 11;

Holbrook v. United States (CCA 8, 1943), 136 F. (2d) 649, 651;

Holbrook v. Hunter (CCA 10, 1945), 149 F. (2d) 230, 231;

United States v. Sims (D.C. W.D. Mo., 1946), 72 F. Supp. 631.

See also:

Gant v. United States (CCA 5, 1947), 161 F. (2d) 793, 795 and 797.

For that offense under the Constitution he could be condemned to only one punishment.

Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872;

In re Bradley, 318 U. S. 50, 63 S. Ct. 470.

For a thorough discussion of the principle just stated see the dissenting opinion of Circuit Judge Sibley in *Gant v. United States,* supra.

The first term of imprisonment imposed by the trial Court on count one of the indictment was entirely legal and valid and has been fully served. The second term of imprisonment imposed by the trial Court on count two, when first imposed, was expressly made to run after the first and is illegal and void.

It could be further and independently argued that the first count of the indictment which purports to be drawn under subdivision (a) of Section 588b, Title 12 U.S.C.A. only in fact recites all the elements essential to the aggravation of the offense provided for under subdivision (b) of that statute.

An allegation of an assault with a dangerous weapon recites all the elements essential for a completed aggravated offense under subdivision (b) since this subdivision covers either the assault *or* the putting in jeopardy the life of a person by the use of a dangerous weapon.

The first count alleges a taking "by force and violence and putting in fear the said Donald G. Swarthout by threats of force and violence and by the *use* and display of dangerous and deadly weapons." This is clearly a factual recitation of an assault by the use of a dangerous weapon.

See:

District of Columbia v. Buckley, 128 F. (2d) 17, 21 (concurring opinion of Judge Rutledge);

Barnes v. United States, 142 F. (2d) 648, 650;

Bertsch v. Snook, 36 F. (2d) 155, 156.

It might here be noted that for the reasons above stated the instant case may be distinguished from *Wilson v. United States,* supra, for in the latter case the first count "did not charge any aggravating circumstances".

From the foregoing it conclusively follows that counts one and two each charge the identical aggravated offense, and it was error to impose separate sentences on each count.

Ex parte Lange, supra;

Holbrook v. Hunter, supra;

Johnston v. Lagomarsino, 88 F. (2d) 86;

Colson v. Johnston, 35 F. Supp. 317.

The sentence on the first count, being the first to be imposed and being made to run before the sentence on the second count became effective. (T. 12 and 13), has been fully satisfied and petitioner is therefore entitled to his immediate discharge.

The sentence imposed by the trial Court on count two of the indictment being illegal and void for the reasons above stated and the petitioner, having fully served the sentence imposed on count one, is entitled to his immediate discharge. The Circuit Court of Appeals for the Ninth Circuit and the District Court

in the failing to order the discharge of petitioner each erred.

SPECIFICATIONS OF ERROR 4 AND 5.

The contention of petitioner under specifications of error 4 and 5 is wholly independent of that made under specifications of error 2 and 3 and each contention is sufficient in and of itself to require petitioner's immediate discharge.

In the Supreme Court, in *Holiday v. Johnston,* supra, the government conceded that Section 588b(a) and (b) does not create separate crimes, but prescribes alternative sentences for the same crime depending upon its manner of perpetration. See also *Wilson v. United States,* supra, wherein the Court said:

> "Subsection (b), as we construe it, does not define an offense distinct from the offense defined in subsection (a). It does prescribe minimum and maximum penalties for an aggravated form of the offense defined in subsection (a). These penalties are in lieu of, and not in addition to, those prescribed in subsection (a)."

Petitioner has fully served and satisfied the sentence under count one of the indictment (T. 5) and he now contends, and properly so, that having served one of the alternative prescribed sentences imposed for the same crime, he is now entitled to his discharge.

Ex parte Lange, supra;

In re Bradley, supra.

In both of these cited cases it was held that since there had been a legal satisfaction of one alternative provision of the original sentence any attempt to compel the defendant to serve the other alternative portion thereof would be subjecting him to double junishment.

For recent cases which are fully in accord with the principles above stated and which clearly demonstrate the right of appellant to his discharge after having fully suffered one of the alternative punishments to which the law alone subjected him the Court's attention is invited to:

Holbrook v. United States, supra;
Miller v. United States, 147 F. (2d) 372;
Holbrook v. Hunter, supra.

See also:

Giles v. United States, 157 F. (2d) 588.

In *Holbrook v. United States,* supra, the Court clearly indicated under circumstances somewhat similar to those present in the instant case and involving the same statute here involved that where there has been a legal satisfaction of one of the alternative sentences, the petitioner is entitled to his discharge. The pertinent language of the opinion in that case reads as follows:

> "* * * The statute itself contains no language restricting the right of the court to impose a sentence under any particular subsection that has been violated, where there has been a conviction for more than one degree of a bank robbery offense. The only limitation, therefore, that can

soundly exist in the situation is simply the constitutional prohibition against subjecting a defendant to more than one punishment in the federal courts for the same crime. * * *

"Since neither sentence of itself is invalid by the terms of the statute, and the only invalidity in the situation derives from the constitutional prohibition against double jeopardy or punishment, justice and reason dictate, in such a case, that the court and not the defendant shall have the right to say which of the two consecutive sentences, contemporaneously imposed and both unexecuted, shall be eliminated in order not to subject the defendant to the possibility of double punishment. *That question may properly be determined by the trial court up to the time that there has been a legal satisfaction of one of the sentences,* and appropriate action may be taken to vacate the sentence which the court concludes should be voided, in order not to impinge upon the defendant's right against double punishment.

"*In the present case there can be no claim that either one of the sentences has as yet been legally satisfied.* * * * Since in either situation they would be receiving proper credit for the time served, they can have no cause to complain, no matter which sentence may be set aside, *so long as there has been no legal satisfaction of either under the terms and conditions of the judgment.* * * *

"The defendant satisfied the judgment as to payment of the fine before any attempt was made to amend the sentence order. *It was accordingly held in both of these cases that since there had thus been a legal satisfaction of one valid alterna-*

> *tive provision of the original sentence, any attempt to compel the defendant to serve the imprisonment portion of the sentence would be subjecting him to double punishment.* But here there was not legal satisfaction of the five-year term, as we have pointed out, because imprisonment under that sentence, by the terms of the judgment, was not to commence until the twenty-year sentence had been served. Until the twenty-year sentence had been served or vacated, satisfaction of the five-year sentence would not legally have commenced to run. * * *" (pp. 651, 652.)

In the same volume of the Federal Supplement in which the opinion of District Judge George B. Harris in the instant case is reported and immediately following it is the opinion of District Judge Albert L. Reeves for the Western District of Missouri in the case of *United States v. Sims,* 72 F. Supp. 631, which is directly opposed to that of Judge Harris. The conclusion of District Judge Albert L. Reeves was followed by District Judge Eugene Rice for the Eastern District of Oklahoma in a parallel case, to-wit: *United States v. Melton,* No. 19,855 (unreported). A certified copy of the judgment in the latter case was introduced in evidence and made a part of the record in the Court below.

See also the dissenting opinion of Circuit Judge Sibley in *Gant v. United States,* supra.

CONCLUSION.

Petitioner respectfully submits that it logically and inescapably follows that the crimes charged against him in both counts of the indictment in the instant case constitute but a single sentenceable offense and that petitioner, having fully served and satisfied the sentence imposed on the first count of the indictment (whether because the sentence on the second count is void or because the sentences on the first and second count are alternative sentences), is entitled to his immediate discharge. His continued detention and imprisonment constitutes a violation of the constitutional prohibition against double punishment for the same crime.

The importance of the questions herein involved and the conflicting interpretations given Section 588b (a) and (b) of Title 12 U.S.C.A. by the District Courts and the Circuit Courts of Appeal amply justify the issuance of a writ of certiorari.

It is respectfully submitted that the prayer of the foregoing petition should be granted.

Dated, San Francisco, California,
December 26, 1947.

A. J. ZIRPOLI,
Attorney for Petitioner.

(Appendix Follows.)

Title 12 U.S.C.A.

Sec. 588b. Robbery of bank; assault in committing or attempting to commit bank robbery; receiving or disposing of stolen goods.

(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this

section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.